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C O N F I D E N T I A L SECTION 01 OF 03 JAKARTA 000821

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SUBJECT: CONSTITUTIONAL COURT DECISIONS GENERATE POLITICAL  
BLOWBACK

REF: A. 06 JAKARTA 13476  
[B](#). JAKARTA 514  
[C](#). 06 JAKARTA 13603  
[D](#). 06 JAKARTA 3490

Classified By: Political Officer Adam West for reasons 1.4(b) and (d).

#### Summary -----

[1](#). (SBU) Indonesia's Constitutional Court, created in 2003 to improve rule of law and act as a check on Legislative and Executive power, has been the subject of intense criticism by the media and public after a series of controversial decisions overturned important pieces of legislation. Court decisions annulling the Judicial Commission's supervisory authority, eliminating the Truth and Reconciliation Commission and limiting the term of the Anti-Corruption Court have been challenged by non-governmental organizations (NGOs) and members of Parliament. Critics have demanded Parliament reverse or mitigate the effects of Court decisions and called for the Court's reform, although no action has been taken to do so. For its part, the Court has largely been prudent in the use of its mandate, hewing to a fairly rigorous jurisprudential line while not shying away from politically contentious decisions. While the Court has apparently weathered the current storm, it will likely continue to face challenges as it attempts to solidify its position in the Constitutional order. End summary.

#### Guardian of the Constitution -----

[2](#). (U) The establishment of the Constitutional Court (referred to below as "the Court") was part of a constitutional amendment which was enacted in 2001 and implemented in 2003. Modeled on similar institutions in other countries, the Court was envisioned as a key player in protecting Indonesia's democratic transition as enshrined in the amended Constitution of 1945. It was also in part a reaction to what Indonesians perceived as the ease with which the law was manipulated by the Soeharto regime. The Court was vested with five main powers:

- to review the constitutionality of laws passed by the national Parliament;
- to resolve disputes between state institutions;
- to resolve election disputes;
- to issue decisions on the dissolution of political parties;
- and
- to preside in cases of impeachment of the President or Vice

President.

13. (SBU) In order to preserve the Court's independence, its nine members were to be drawn from nominations by each of the government's three branches, i.e. three from the executive, three from Parliament, and three from the Supreme Court. (Note: Indonesia's Supreme Court maintains its role as the highest court of appeals, as well as having judicial review authority over provincial and local ordinances.) The Justices serve simultaneous five-year terms and can be reappointed to a second term. In 2006, the Justices reelected Jimly Asshiddique as Chief Justice. A law professor and former Golkar party leader, Asshiddique is described by Court staff privately as possessing the combination of legal expertise and political savvy the position demands.

#### Controversial Decisions Draw Fire

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14. (SBU) The Court spent much of its first two years focusing on creating an institutional structure and dealing with some 270 disputes arising from the 2004 parliamentary and presidential elections. Its more substantive decisions have met with varied responses. An early case that generated controversy was a 2004 decision annulling the retroactivity of the Anti-terror law. While the decision was a blow to the GOI's counterterrorism efforts, it upheld a legal principle essential to a rule-of-law based system. Several 2004 decisions on cases related to economic reforms raised concerns that the Court might act as a brake on economic liberalization. More recently, at least one of the Court's rulings has won popular approval: a 2006 decision striking down the law that made insulting the President a criminal act

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(ref A).

15. (SBU) Since August 2006, however, a series of controversial decisions have led to intense public criticism and even calls for the Court's powers to be reduced. Three of the more contentious decisions are summarized below:

- In August 2006, the Court declared that the provision granting the Judicial Commission supervisory authority over the judiciary was unconstitutional (ref B). The Commission had been authorized to monitor the conduct of judges and to recommend sanctions against those found to have engaged in unethical behavior. The Court, however, found that lack of precision in the law gave the Commission a pretext for challenging the content of judicial decisions, thereby interfering with judicial independence and demeaning the integrity of the judiciary. The decision was called a "victory for corruptors" by opponents, including the Attorney General. Critics claimed that the decision was nothing but a cynical move on the part of the Justices to protect themselves from external oversight. Others quietly defended the decision, however, pointing out that the Commission had exceeded its mandate and was interfering in judicial matters, and that the legislature needed to draft a better law.

- In December 2006, the court ruled that the law establishing a Truth and Reconciliation Commission (KKR) to investigate past human rights violations created legal uncertainty and was therefore unconstitutional. The decision was attacked by human rights activists and victims claiming that the decision would render resolution of their cases more difficult. Interestingly, some activists quietly rejoiced in the belief that the KKR would have provided amnesty rather than justice for human rights violators. Critics also attacked the decision on legal grounds, claiming that the Court had ruled beyond the issues in dispute: the plaintiff had challenged only the provisions of the law relating to compensation and restitution, while the decision annulled the law in its entirety. The Court, for its part, argued that the provisions found to be unconstitutional were so central

to the functioning of the KKR that the body would be rendered useless without them.

- Also in December, the Court ruled that the special Anti-Corruption Court (ACC) was unconstitutional (ref C). The ACC, created as part of the 2003 legislation creating the Anti-Corruption Commission, was held in high esteem by anti-corruption advocates for its impressive 100% conviction rate. However, the Constitutional Court found that the ACC used a set of standards and trial procedures which differed from those applied in the regular courts, which also have jurisdiction over corruption cases. The Court found that this created a situation of "legal uncertainty," as two suspects charged with the same crime could get widely differing sentences depending on which court conducted the trial. In this case, however, the Constitutional Court also ruled that the ACC could continue to function for a period of three years so that the cases currently under investigation would not be thrown into limbo. The Court recommended that Parliament use that period of time to draft a new legal basis for the ACC more in line with constitutional requirements. The three-year lead-time demonstrated the Court's recognition of the political importance of sustaining the government's campaign against corruption, especially in view of the fact that the Court had declared the ACC unconstitutional. It is not clear how this decision will affect the ongoing efforts of the Corruption Eradication Commission (KPK), which refers cases to the court and already has a difficult job with its huge mandate and limited resources (ref D).

#### Legislative Remedies Moving Slowly

16. (C) The barrage of criticism from these successive decisions has put the Court somewhat on the defensive. After each decision, critics claimed that the Court was undermining the authority of the Parliament and disrupting the function of state institutions. So far, however, neither the Parliament nor the President has begun to draft new legislation to put the affected institutions on a more solid, constitutional footing. Andi Mattalatta, Golkar party leader and member of the parliamentary committee which handles judicial issues, told us that he expected to see some legislation on these issues in the future but that this was not the committee's highest priority, notwithstanding the

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public outcry. Mattalatta said he expected to see the ACC reauthorized but as a branch of the general court system rather than apart from it. He also told us there was a possibility that Parliament would draft a new law on the Judicial Commission, but he did not speculate what form it would take.

17. (C) Dissatisfaction with Court decisions has also led to calls for its reform. The National Legal Reform Commission's year-end report for 2006 called the Court "out of control" and "out of step with society's aspirations," and recommended that Parliament draft new legislation to limit its power. This idea has been publicly supported by some parliamentarians. Mattalatta privately asserted that the Court had overstepped its authority and needed to be "repositioned." However, because this would probably require a constitutional amendment, Mattalatta told us, it was unlikely to take place before the 2009 national elections.

#### Proponents See Solid Jurisprudence in Decisions

18. (SBU) While critics have dominated the press coverage of these events, the Court does have its quiet defenders, many of whom see these controversies as the growing pains of a new constitutional system. The main problem, according to one judge, is that many sectors of society, including the Parliament, have simply not fully accepted that the system of checks of balances included in the amended Constitution

requires judicial oversight of legislation. Compounding the problem, one legal expert told us that most legislators lack sufficient expertise to draft bills which meet the standards of legal precision required by the Court. They point out that public criticism of the Court's decisions is directed primarily at their political ramifications, on which the Court constitutionally is unable to comment, rather than the legal reasoning underpinning them.

¶9. (SBU) When the legal basis of decisions has been challenged, the Court has been able to mount a cogent defense. For example, the KKR and ACC decisions, according to Court staffer Fritz Siregar, were both based on legal concepts which are used frequently in similar courts in Europe but little known in Indonesia. Court staffers also point out that the Court, unlike other Indonesian courts, publishes all its decisions online the day they are handed down. This openness makes the Court a far easier target than the Supreme Court, which does not release its decisions to the public. (Note: one of the goals of the Millennium Challenge Corporation Threshold Program in Indonesia is to make Supreme Court decisions available online.)

¶10. (SBU) Comment: The Constitutional Court is designed to play a key role in preserving the constitutional order Indonesia adopted after 1998, and the Justices clearly take this role seriously. Boiler-plate accusations that the Court is merely another governmental body looking out for the interests of its members for the most part ring hollow, despite the natural expectation to the contrary given the historical reputation of state institutions in this country. The Court has shown little hesitancy to issue politically controversial decisions and has prudently chosen to hew to a fairly rigorous jurisprudential line. The lack of urgency regarding reform of the Court in Parliament seems to indicate that the Court has weathered the current storm. If it can continue to strike a balance between solid legal decision making and maintaining sufficient public support, it should be able to solidify its role in Indonesia's emerging constitutional structure.

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